

## § 301.6707A-1T

and seven other persons participate in the organization of the tax shelter, and assume the tax shelter is not registered before the day on which the first offering for sale of an interest in the tax shelter occurs. Assume also that the A and other participants do not have reasonable cause for failure to register timely and the failure is not due to intentional disregard of the registration requirement on the part of any of the participants. The maximum penalty that may be imposed is \$10,000, for which the 8 participants are jointly and severally liable.

Q-10. How will the Internal Revenue Service determine whether a person has intentionally disregarded any of the registration requirements?

A-10. The determination of intentional disregard will be made individually for each tax shelter organizer. If one tax shelter organizer intentionally disregards the registration requirements, the \$10,000 limitation will not apply to that organizer. The limitation will apply, however, to any tax shelter organizers whose failure to register timely or whose furnishing of false or incomplete information was not due to intentional disregard.

Q-11. What is the maximum penalty that may be imposed if a tax shelter that is a substantial investment consisting of similar investments that are required to be aggregated under A-22 of § 301.6171-1T is not timely registered or if false or incomplete information is filed with respect to the tax shelter?

A-11. The maximum penalty is \$10,000 as determined under A-6 of this section, with respect to any investment that is a tax shelter within the meaning of A-4 of § 301.6111-1T without regard to the aggregation rules provided in A-22 of § 301.6111-1T. The maximum penalty that may be imposed with respect to investments that are considered in a single tax shelter only by reason of the aggregation rules of A-22 of § 301.6111-1T is \$10,000, even if more than one Form 8264 is required with respect to the aggregated investment (see A-48 of § 301.6111-1T). The penalty may be imposed, however, if there is a failure with respect to any of the required forms.

## 26 CFR Ch. I (4-1-11 Edition)

### PENALTY FOR FAILURE TO FURNISH A REGISTRATION NUMBER

Q-12. What is the penalty for failure to furnish the registration number to a purchaser or other transferee of an interest in a tax shelter as required by A-52 through A-54 of § 301.6111-1T?

A-12. The penalty for failure to furnish the tax shelter registration number in the form required by A-55 through A-54 of § 301.6111-1T is \$100 for each failure.

### PENALTY FOR FAILURE TO REPORT A REGISTRATION NUMBER ON A RETURN

Q-13. What is the penalty for failure to include the tax shelter registration number on a return on which any deduction, loss, credit, other tax benefit, or any income attributable to a registered tax shelter is included?

A-13. The penalty for each failure by an investor to furnish the tax shelter registration number on such a return is \$50 for each tax shelter, unless the failure is due to reasonable cause.

There is a need for immediate guidance with respect to provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of title 5 of United States Code or subject to the effective date limitation of subsection (d) of that section.

(Secs. 6111 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 26 U.S.C. 6111; 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7964, 49 FR 32725, Aug. 15, 1984; 49 FR 44461, Nov. 7, 1984]

### **§ 301.6707A-1T Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.**

(a) *In general.* Any person who fails to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction may be subject to a monetary penalty. The penalty for failure to include information with respect to a reportable transaction, other than a listed transaction, is \$10,000 in the case of a natural person, and \$50,000 in any other case. The penalty for failure to include information with respect

to a listed transaction is \$100,000 in the case of a natural person, and \$200,000 in any other case. The section 6707A penalty is in addition to any other penalty that may be imposed.

(b) *Definitions*—(1) *Reportable transaction*. The term “reportable transaction” is defined in § 1.6011-4(b)(1) of this chapter.

(2) *Listed transaction*. The term “listed transaction” is defined in section 6707A(c) of the Code and § 1.6011-4(b)(2) of this chapter.

(c) *Assessment of the penalty*—(1) *In general*. The Internal Revenue Service (IRS) may assess a penalty under section 6707A with respect to each failure to disclose a reportable transaction within the time and in the form and manner provided by § 1.6011-4(d) and (e) of this chapter or pursuant to the time, form, and manner stated in other published guidance. A taxpayer who is required to disclose a reportable transaction with a return, amended return, or application for tentative refund and who also is required to disclose the transaction on a Form 8886, “Reportable Transaction Disclosure Statement” (or successor form), filed with the IRS Office of Tax Shelter Analysis (OTSA), is subject to only a single section 6707A penalty for failure to make either one or both of those disclosures. If section 6011 and the regulations thereunder require a disclosure statement to be filed at the time that a return is filed, the disclosure statement is considered to be timely filed if it is filed at the same time as the return, even if the return is filed untimely after its due date.

(2) *Examples*. The rules of paragraph (c)(1) of this section are illustrated by the following examples:

*Example 1.* Taxpayer T is required to attach a Form 8886 to its return for the 2007 taxable year and to send a copy of the Form 8886 to OTSA at the time it files its return. Taxpayer T fails to attach the Form 8886 to its return and fails to send a copy of the Form 8886 to OTSA. Taxpayer T is subject to a single penalty under section 6707A for failure to disclose because Taxpayer T failed to comply with the disclosure requirements of section 6011. A penalty under section 6707A also would apply if Taxpayer T had failed to comply with only one of the two requirements.

*Example 2.* Same as *Example 1*, except that Taxpayer T also subsequently files an

amended return for 2007 that reflects Taxpayer T's participation in the reportable transaction. Taxpayer T fails to attach a Form 8886 to the amended return as required by § 1.6011-4(e)(1) of this chapter. Taxpayer T is subject to an additional penalty under section 6707A for failing to disclose a reportable transaction.

*Example 3.* In November 2009, Taxpayer U participates in a reportable transaction resulting in a loss that is carried back to 2008. Taxpayer U fails to attach a Form 8886 to its 2008 amended return claiming the loss carryback. Section 1.6011-4(e)(1) of this chapter requires Taxpayer U to attach a Form 8886 to its amended return for the 2008 taxable year. Taxpayer U is subject to a penalty under section 6707A.

*Example 4.* Taxpayer P participates in a non-listed reportable transaction and is required to attach a Form 8886 to its return for the 2008 taxable year that is due on March 16, 2009. Taxpayer P timely files its return but fails to attach the Form 8886 to its return. After the due date of Taxpayer P's return and without an extension of time to file, Taxpayer P files an amended return relating to the 2008 taxable year to which Taxpayer P attaches the Form 8886. Taxpayer P is subject to a penalty under section 6707A for failure to disclose because Taxpayer P failed to comply with the disclosure requirements of section 6011 by not attaching a Form 8886 to its return for the 2008 taxable year that was timely filed on or before the due date of March 16, 2009. A penalty under section 6707A also would apply if Taxpayer P had failed to attach a Form 8886 to its amended return. Taxpayer P, nevertheless, may file a complete and proper Form 8886 and request in writing rescission of the penalties assessed within 30 days after the date the IRS sends notice and demand for payment of the penalties in accordance with Rev. Proc. 2007-21. The filing of the untimely Form 8886 will weigh heavily in favor of rescission provided that Taxpayer P files the Form 8886 prior to the date the IRS first contacts the taxpayer concerning a tax examination for the 2008 taxable year and there are no other circumstances that suggest that Taxpayer P delayed filing the Form 8886 until after the IRS had taken steps to identify Taxpayer P's participation in the reportable transaction in question.

*Example 5.* Shareholder V, a shareholder in an S Corporation, receives a timely Schedule K-1 “Partner's Share of Income, Deductions, Credits, etc.” on April 10, 2009, and determines that she is required to attach a Form 8886 to her individual income tax return for the 2008 taxable year. Shareholder V fails to attach the Form 8886 to her 2008 individual income tax return but files a proper and complete Form 8886 with OTSA on June 12, 2009. Section 1.6011-4(e)(1) of this chapter provides that if a taxpayer who is a partner

in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K-1 less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K-1, the taxpayer determines that the taxpayer participated in a reportable transaction, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with OTSA within 60 calendar days after the due date of the taxpayer's return (including extensions). Accordingly, Shareholder V is not subject to a penalty under section 6707A for failure to disclose.

*Example 6.* In July 2008, Taxpayer W participates in Transaction Z, a transaction that is not reportable as of April 15, 2009, the date Taxpayer W files his individual income tax return for 2008. On July 15, 2009, Transaction Z is identified as a transaction of interest. Section 1.6011-4(e)(2)(i) of this chapter provides that if a transaction that is not otherwise a reportable transaction becomes a listed transaction or a transaction of interest after the taxpayer has filed a tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or transaction of interest, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest. Taxpayer W fails to file a Form 8886 with OTSA by October 13, 2009, 90 calendar days after the date that the transaction was identified as a transaction of interest. Accordingly, Taxpayer W is subject to a penalty under section 6707A.

*Example 7.* Taxpayer X is required to attach a Form 8886 to its return for the 2008 taxable year with respect to participation in a listed transaction. Taxpayer X attaches the Form 8886 to its return in a timely manner. The Form 8886, however, does not describe any of the potential tax benefits expected to result from this transaction and states that information will be provided upon request. Because the Form 8886 does not describe any of the potential tax benefits expected to result from the transaction and merely provides that the information will be provided upon request, the Form 8886 filed by Taxpayer X is incomplete and does not satisfy the requirements set forth in § 1.6011-4(d) of this chapter. Taxpayer X is subject to a penalty under section 6707A for failure to disclose in the appropriate manner.

(d) *Rescission authority*—(1) *In general.* The Commissioner (or the Commissioner's delegate) may rescind the section 6707A penalty if—

(i) The violation relates to a reportable transaction that is not a listed transaction, and

(ii) Rescinding the penalty would promote compliance with the requirements of the Code and effective tax administration.

(2) *Requesting rescission.* The Secretary may prescribe the procedures for a taxpayer to request rescission of a section 6707A penalty with respect to a reportable transaction other than a listed transaction by publishing a revenue procedure or other guidance in the Internal Revenue Bulletin.

(3) *Factors that weigh in favor of granting rescission.* In determining whether rescission would promote compliance with the requirements of the Code and effective tax administration, the Commissioner (or the Commissioner's delegate) will take into account the following list of factors that weigh in favor of granting rescission. This is not an exclusive list and no single factor will be determinative of whether to grant rescission in any particular case. Rather, the Commissioner (or the Commissioner's delegate) will consider and weigh all relevant factors, regardless of whether the factor is included in this list.

(i) The taxpayer, upon becoming aware that it failed to disclose a reportable transaction properly, filed a complete and proper, albeit untimely, Form 8886 (or successor form). This factor will weigh heavily in favor of rescission provided that—

(A) the taxpayer files the Form 8886 prior to the date the IRS first contacts the taxpayer (including contacts by the IRS with any partnership in which the taxpayer is a partner, any S corporation in which the taxpayer is a shareholder, or any trust in which the taxpayer is a beneficiary) concerning a tax examination for the tax period in which the taxpayer participated in the reportable transaction; and

(B) other circumstances suggest that the taxpayer did not delay filing an untimely but properly completed Form 8886 until after the IRS had taken steps to identify the taxpayer's participation

in the reportable transaction in question.

(ii) The failure to disclose properly was due to an unintentional mistake of fact that existed despite the taxpayer's reasonable attempts to ascertain the correct facts with respect to the transaction.

(iii) The taxpayer has an established history of properly disclosing other reportable transactions and complying with other tax laws.

(iv) The taxpayer demonstrates that the failure to include on any return or statement any information required to be disclosed under section 6011 arose from events beyond the taxpayer's control.

(v) The taxpayer cooperates with the IRS by providing timely information with respect to the transaction at issue that the Commissioner (or the Commissioner's delegate) may request in consideration of the rescission request. In considering whether a taxpayer cooperates with the IRS, the Commissioner (or the Commissioner's delegate) will take into account whether the taxpayer meets the deadlines described in Rev. Proc. 2007-21 (or successor document) (see § 601.601(d)(2)(ii)(b) of this chapter) for complying with requests for additional information.

(vi) Assessment of the penalty weighs against equity and good conscience, including whether the penalty is disproportionate to the tax benefit received and whether the taxpayer demonstrates that there was reasonable cause for, and the taxpayer acted in good faith with respect to, the failure to timely file or to include on any return any information required to be disclosed under section 6011. An important factor in determining reasonable cause and good faith is the extent of the taxpayer's efforts to ensure that persons who prepared the taxpayer's return were informed of the taxpayer's participation in the reportable transactions. The presence of reasonable cause, however, will not necessarily be determinative of whether to grant rescission.

(4) *Absence of favorable factors weighs against rescission.* The absence of facts establishing the factors described in paragraph (d)(3) of this section weighs against granting rescission. The ab-

sence of any one of these factors, however, will not necessarily be determinative of whether to grant rescission.

(5) *Factors not considered.* In determining whether to grant rescission, the Commissioner (or the Commissioner's delegate) will not consider doubt as to liability for, or collectibility of, the penalties.

(e) *Reports to the Securities and Exchange Commission (SEC)*—(1) *In general.* Under section 6707A(e), a taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) must disclose in periodic reports filed with the SEC the requirement to pay each of the following penalties:

(i) The penalty imposed by section 6707A(a) in the amount of \$200,000 for failure to disclose a listed transaction.

(ii) The accuracy-related penalty imposed by section 6662A(a) at the 30-percent rate determined under section 6662A(c) for a reportable transaction understatement with respect to which the relevant facts affecting the tax treatment of the reportable transaction were not adequately disclosed in accordance with regulations prescribed under section 6011.

(iii) The accuracy-related penalty imposed by section 6662(a) at the 40-percent rate determined under section 6662(h) for a gross valuation misstatement, if the taxpayer (but for the exclusionary rule of section 6662A(e)(2)(C)(ii)) would have been subject to the accuracy-related penalty under section 6662A(a) at the 30-percent rate determined under section 6662A(c).

(iv) The penalty described in paragraph (e)(3) of this section for failure to disclose in periodic reports filed with the SEC the requirement to pay any of the penalties described in paragraphs (e)(1)(i) through (iii) or (e)(3) of this section.

(2) *Manner and content of disclosure.* The Secretary may prescribe the manner in which disclosure of the requirement to pay the penalties identified in paragraph (e)(1) of this section must be made on reports filed with the SEC, including identification of the specific SEC form and section thereof in which the taxpayer must make the disclosure

as well as specification of the timing and contents of the disclosure, by publishing a revenue procedure or other guidance in the Internal Revenue Bulletin.

(3) *Penalty for failure to disclose in SEC filings.* Any taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) may be subject to a penalty in the amount of \$200,000 for each failure to disclose the requirement to pay a penalty identified in paragraphs (e)(1)(i) through (e)(1)(iii) of this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The taxpayer also may be subject to an additional penalty in the amount of \$200,000 for each failure to disclose a penalty arising under this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The penalty provided by this paragraph is not subject to rescission as described in paragraph (d) of this section.

(f) *Effective/applicability date*—(1) The rules of this section apply to disclosure statements that are due after September 11, 2008.

(2) The applicability of this section expires on or before September 9, 2011.

[T.D. 9425, 73 FR 52786, Sept. 11, 2008]

**§ 301.6708-1T Failure to maintain list of investors in potentially abusive tax shelters (temporary).**

The following questions and answers issued under section 6708 of the Internal Revenue Code of 1954, as added by section 142 of the Tax Reform Act of 1984 (Pub. L. 98-369; 98 Stat. 683), relate to the penalty for failure to maintain a list of investors in potentially abusive tax shelters.

**Q-1:** What penalties are provided with respect to the failure properly to maintain a list of persons who acquire interests in potentially abusive tax shelters?

**A-1:** Any organizer (as defined in A-5 of § 301.6112-1T) of a tax shelter (as defined in A-3 of § 301.6112-1T) or seller (as defined in A-6 of § 301.6112-1T) of interests in a tax shelter who fails to meet any requirement imposed by section 6112 regarding the requirement to

maintain a list of persons who have acquired interests in a tax shelter shall pay a penalty of \$50 for each investor with respect to whom there is such a failure, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. For example, if an organizer who is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter fails to maintain the list, the organizer will be liable for a penalty of \$5,000 (\$50 × 100 persons), unless the organizer can show the failure was due to reasonable cause and not due to willful neglect. As another example, if a seller is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter from the seller and fails properly to maintain such list by omitting the TIN of each person, the seller will be liable for a penalty of \$5,000 (\$50 × 100 persons), unless the seller can show the failure was due to reasonable cause and not due to willful neglect.

**Q-2:** If an organizer or seller properly maintains a list, but fails to make the list available to the Internal Revenue Service upon request, will the organizer or seller be subject to a penalty?

**A-2:** Yes. A penalty applies if an organizer or seller fails to meet any requirement imposed by section 6112, including the requirement, upon request, to make the list available to the Internal Revenue Service as soon as practicable, but in any event within 10 calendar days. (See A-21 of § 301.6112-1T). The amount of the penalty is \$50 for each person required to be on the list at the time of the request by the Internal Revenue Service. Assume, for example, that an organizer of a tax shelter properly maintains a list of 200 persons who have acquired interests in a tax shelter and that the Internal Revenue Service requests the organizer to provide the list. If the organizer fails to provide the list to the Internal Revenue Service as soon as practicable (as required by A-21 of § 301.6112-1T), or in a form that enables the Internal Revenue Service to obtain the required information without undue delay or difficulty (as required by A-16 of § 301.6112-1T), the organizer will be liable for a penalty of \$10,000 (\$50 × 200 persons), unless the organizer can show that the